

93RD CONGRESS
2ND SESSION

H. R. 12471

IN THE SENATE OF THE UNITED STATES

MARCH 19, 1974

Received

MAY 30, 1974

Considered, amended, read the third time, and passed

[Strike out all after the enacting clause and insert the part printed in *italics*]

AN ACT

To amend section 552 of title 5, United States Code, known as the Freedom of Information Act.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 Section 1: ~~(a)~~ The fourth sentence of section 552 ~~(a)~~
- 4 ~~(2)~~ of title 5, United States Code, is amended by striking
- 5 out "and make available for public inspection by copying"
- 6 and inserting in lieu thereof "*promptly publish, and dis-*
- 7 *tribute (by sale or otherwise) copies of*."
- 8 ~~(b)~~ Section 552 ~~(a)~~ ~~(3)~~ of title 5, United States Code,
- 9 is amended by striking out "on request for identifiable records
- 10 made in accordance with published rules stating the time,
- 11 place, fees to the extent authorized by statute, and proce-

1 dure to be followed," and inserting in lieu thereof the
2 following: "upon any request for records which (A) rea-
3 sonably describes such records, and (B) is made in accord-
4 ance with published rules stating the time, place, fees to
5 the extent authorized by statute, and procedure to be
6 followed,".

7 (c) Section 552(a) of title 5, United States Code, is
8 amended by adding at the end thereof the following new
9 paragraph:

10 "(5) Each agency, upon receipt of any request for
11 records made under this subsection, shall—

12 "(A) determine within ten days (excepting Sat-
13 urdays, Sundays, and legal public holidays) after the
14 date of such receipt whether to comply with the request
15 and shall immediately notify the person making the
16 request of such determination and the reasons therefor,
17 and of the right of such person to appeal to the head of
18 the agency any adverse determination; and

19 "(B) make a determination with respect to such
20 appeal within twenty days (excepting Saturdays, Sun-
21 days, and legal public holidays) after the date of receipt
22 of such appeal.

23 "Any person making a request to an agency for records
24 under this subsection shall be deemed to have exhausted his
25 administrative remedies with respect to such request if the

1 agency fails to comply with subparagraph (A) or (B) of
2 this paragraph. Upon any determination by an agency to
3 comply with a request for records, the records shall be made
4 promptly available to the person making such request."

5 ~~(d)~~ The third sentence of section 552(a)(3) of title 5,
6 United States Code, is amended by inserting immediately
7 after "the court shall determine the matter de novo" the
8 following: "; and may examine the contents of any agency
9 records in camera to determine whether such records or any
10 part thereof shall be withheld under any of the exemptions
11 set forth in subsection (b);".

12 ~~(e)~~ Section 552(a)(3) of title 5, United States Code,
13 is amended by adding at the end thereof the following new
14 sentence: "Notwithstanding any other provision of law, the
15 United States or the officer or agency thereof against whom
16 the complaint was filed shall serve a responsive pleading to
17 any complaint made under this paragraph within twenty
18 days after the service upon the United States attorney of the
19 pleading in which such complaint is made, unless the court
20 otherwise directs for good cause shown. The court may
21 assess against the United States reasonable attorney fees and
22 other litigation costs reasonably incurred in any case under
23 this section in which the United States or an officer or
24 agency thereof as litigant, has not prevailed."

1. SEC. 2. Section 552(b)(1) of title 5, United States
2. Code, is amended to read as follows:

3. "~~(1)~~ authorized under criteria established by an
4. Executive order to be kept secret in the interest of the
5. national defense or foreign policy;"

6. SEC. 3. Section 552 of title 5, United States Code, is
7. amended by adding at the end thereof the following new
8. subsections:

9. "~~(d)~~ On or before March 1 of each calendar year, each
10. agency shall submit a report covering the preceding calendar
11. year to the Speaker of the House and the President of the
12. Senate for referral to the appropriate committees of the Con-
13. gress. The report shall include—

14. "~~(1)~~ the number of determinations made by such
15. agency not to comply with requests for records made
16. to such agency under subsection (a) and the reasons
17. for each such determination;

18. "~~(2)~~ the number of appeals made by persons under
19. subsection (a)(5)(B), the result of such appeals, and
20. the reason for the action upon each appeal that results
21. in a denial of information;

22. "~~(3)~~ a copy of every rule made by such agency
23. regarding this section;

24. "~~(4)~~ a copy of the fee schedule and the total

1 amount of fees collected by the agency for making
2 records available under this section; and

3 ~~“(5) such other information as indicates efforts to~~
4 ~~administer fully this section.~~

5 ~~“(e) Notwithstanding section 551(1) of this title, for~~
6 ~~purposes of this section, the term ‘agency’ means any execu-~~
7 ~~tive department, military department, Government corpora-~~
8 ~~tion, Government controlled corporation, or other establish-~~
9 ~~ment in the executive branch of the Government (including~~
10 ~~the Executive Office of the President), or any independent~~
11 ~~regulatory agency.”~~

12 SEC. 4. The amendments made by this Act shall take
13 effect on the ninetieth day beginning after enactment of
14 this Act.

15 That (a) the fourth sentence of section 552(a)(2) of title
16 5, United States Code, is deleted and the following substi-
17 tuted in lieu thereof: “Each agency shall maintain and make
18 available for public inspection and copying current indexes
19 providing identifying information for the public as to any
20 matter issued, adopted, or promulgated after July 4, 1967,
21 and required by this paragraph to be made available or pub-
22 lished. Each agency shall publish, quarterly or more fre-
23 quently, each index unless it determines by order published
24 in the Federal Register that the publication would be unneces-

1 sary and impracticable, in which case the agency shall none-
2 theless provide copies of such index on request at a cost
3 comparable to that charged had the index been published.”

4 (b)(1) Section 552(a)(3) of title 5, United States
5 Code, is amended to read as follows:

6 “(3) Except with respect to the records made avail-
7 able under paragraphs (1) and (2) of this subsection, each
8 agency, upon any request for records which reasonably de-
9 scribes such records and which is made in accordance with
10 published rules stating the time, place, fees, and procedures
11 to be followed, shall make the records promptly available
12 to any person. When such records are made available under
13 this section in matters which the person seeking those records
14 can demonstrate to be of general public concern, the agency
15 complying with the request for the records shall make them
16 available for public inspection and purchase in accordance
17 with the provisions of this Act, unless the agency can de-
18 monstrate that such records could subsequently be denied to
19 another individual under the exceptions provided for in sub-
20 section (b) of this Act.”.

21 (2) Section 552(a) of such title 5 is amended by redес-
22 ignating paragraph (4) as paragraph (5) and by inserting
23 immediately after paragraph (3) the following new para-
24 graph:

25 “(4)(A) In order to carry out the provisions of this

1 section, the Director of the Office of Management and Budget
2 shall promulgate regulations, pursuant to notice and receipt
3 of public comment, specifying a uniform schedule of fees ap-
4 plicable to all agencies. Such fees shall be limited to reason-
5 able standard charges for document search and duplication
6 and provide recovery of only the direct costs of such search
7 and duplication. Documents may be furnished without charge
8 or at a reduced charge where the agency determines that
9 waiver or reduction of the fee is in the public interest because
10 furnishing the information can be considered as primarily
11 benefiting the general public. But such fees shall ordinarily
12 not be charged whenever—

13 “(i) the person requesting the records is an indigent
14 individual;

15 “(ii) such fees would amount, in the aggregate, for
16 a request or series of related requests, to less than \$3;

17 “(iii) the records requested are not found; or

18 “(iv) the records located are determined by the
19 agency to be exempt from disclosure under subsection
20 (b).

21 “(B) On complaint, the district court of the United
22 States in the district in which the complainant resides, or
23 has his principal place of business, or in which the agency
24 records are situated, or in the District of Columbia, has
25 jurisdiction to enjoin the agency from withholding agency

1 records and to order the production of any agency records
2 improperly withheld from the complainant. In such a case
3 the court shall consider the case de novo, with such in camera
4 examination of the requested records as it find appropriate
5 to determine whether such records or any part thereof may
6 be withheld under any of the exemptions set forth in subsec-
7 tion (b) of this section, and the burden is on the agency to
8 sustain its action.

9 “(C) Notwithstanding any other provision of law, the
10 defendant shall serve an answer or otherwise plead to any
11 complaint made under this subsection within forty days
12 after the service upon the United States attorney of the
13 pleading in which such complaint is made, unless the court
14 otherwise directs for good cause shown.

15 “(D) Except as to causes the court considers of greater
16 importance, proceedings before the district court, as author-
17 ized by this subsection, and appeals therefrom, take prece-
18 dence on the docket over all causes and shall be assigned for
19 hearing and trial or for argument at the earliest practicable
20 date and expedited in every way.

21 “(E) The court may assess against the United States
22 reasonable attorney fees and other litigation costs reasonably
23 incurred in any case under this section in which the com-
24 plainant has substantially prevailed. In exercising its discre-
25 tion under this paragraph, the court shall consider the benefit

1 to the public, if any, deriving from the case, the commercial
2 benefit to the complainant and the nature of his interest in the
3 records sought, and whether the Government's withholding of
4 the records sought had a reasonable basis in law.

5 “(F) Whenever records are ordered by the court to be
6 made available under this section, the court shall on motion
7 by the complainant find whether the withholding of such rec-
8 ords was without reasonable basis in law and which Federal
9 officer or employee was responsible for the withholding. Be-
10 fore such findings are made, any officers or employees named
11 in the complainant's motion shall be personally served a copy
12 of such motion and shall have 20 days in which to respond
13 thereto, and shall be afforded an opportunity to be heard by
14 the court. If such findings are made, the court shall, upon
15 consideration of the recommendation of the agency, direct
16 that an appropriate official of the agency which employs such
17 responsible officer or employee suspend such officer or em-
18 ployee without pay for a period of not more than 60 days
19 or take other appropriate disciplinary or corrective action
20 against him.

21 “(G) In the event of noncompliance with the order of
22 the court, the district court may punish for contempt the
23 responsible employee, and in the case of a uniformed service,
24 the responsible member.”

10

1 (3) Section 552(b)(7) is amended to read as follows:

2 “Investigatory records compiled for law enforcement pur-
3 poses, but only to the extent that the production of such
4 records would (A) interfere with enforcement proceedings,
5 (B) deprive a person of a right to a fair trial or an impartial
6 adjudication or constitute a clearly unwarranted invasion of
7 personal privacy, (C) disclose the identity of an informer,
8 or (D) disclose investigative techniques and procedures.”.

9 (c) Section 552(a) of title 5, United States Code, is
10 amended by adding at the end thereof the following new
11 paragraph:

12 “(6)(A) Each agency, upon any request for records
13 made under paragraph (1), (2), or (3) of this subsection,
14 shall—

15 “(i) determine within ten days (excepting Satur-
16 days, Sunday, and legal public holidays) after the
17 receipt of any such request whether to comply with such
18 request and shall immediately notify the person making
19 such request of such determination and the reasons there-
20 for, and of the right of such person to appeal to the head
21 of the agency any adverse determination; and

22 “(ii) make a determination with respect to such
23 appeal within twenty days (excepting Saturdays, Sun-

24 days, and legal public holidays) after the receipt of such

25 appeal. If on appeal the denial of the request for records

1 is in whole or part upheld, the agency shall notify the
2 person making such request of the provisions for judicial
3 review of that determination under paragraph (4) of
4 this subsection.

5 “(B) Upon the written certification by the head of an
6 agency setting forth in detail his personal findings that a
7 regulation of the kind specified in this paragraph is necessi-
8 tated by such factors as the volume of requests, the volume of
9 records involved, and the dispersion and transfer of such
10 records, and with the approval in writing of the Attorney
11 General, the time limit prescribed in clause (i) for initial
12 determinations may by regulation be extended with respect
13 to specified types of records of specified components of such
14 agency so as not to exceed thirty working days. Any such
15 certification shall be effective only for periods of fifteen
16 months following publication thereof in the Federal Register.

17 “(C) In unusual circumstances as specified in this sub-
18 paragraph, the time limits prescribed in clauses (i) or (ii)
19 of subparagraph (A), but not those prescribed pursuant to
20 subparagraph (B); may be extended by written notice to the
21 requester setting forth the reasons for such extension and the
22 date on which a determination is expected to be dispatched. No
23 such notice shall specify a date that would result in an exten-
24 sion for more than ten working days. As used in this subpara-
25 graph, ‘unusual circumstances’ means, but only to the extent

1 *reasonably necessary to the proper processing of the partic-*
2 *ular request—*

3 *“(i) the need to search for and collect the requested*
4 *records from field facilities or other establishments that*
5 *are separate from the office processing the request;*

6 *“(ii) the need to assign professional or managerial*
7 *personnel with sufficient experience to assist in efforts to*
8 *locate records that have been requested in categorical*
9 *terms, or with sufficient competence and discretion to aid*
10 *in determining by examination of large numbers of rec-*
11 *ords whether they are exempt from compulsory disclosure*
12 *under this section and if so, whether they should never-*
13 *theless be made available as a matter of sound policy*
14 *with or without appropriate deletions;*

15 *“(iii) the need for consultation, which shall be con-*
16 *ducted with all practicable speed, with another agency*
17 *having a substantial interest in the determination of the*
18 *request or among two or more components of the agency*
19 *having substantial subject-matter interest therein, in order*
20 *to resolve novel and difficult questions of law or policy;*
21 *and*

22 *“(iv) the death, resignation, illness, or unavailability*
23 *due to exceptional circumstances that the agency could*
24 *not reasonably foresee and control, of key personnel*

25 *whose assistance is required in processing the request and*
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13.

1 who would ordinarily be readily available for such
2 duties.
3 “(D) Whenever practicable, requests and appeals shall
4 be processed more rapidly than required by the time periods
5 specified under (i) and (ii) of subparagraph (A) and para-
6 graphs (B) and (C). Upon receipt of a request for specially
7 expedited processing accompanied by a substantial showing
8 of a public interest in a priority determination of the request,
9 including but not limited, to requests made for use of any
10 person engaged in the collection and dissemination of news,
11 an agency may by regulation or otherwise provide for special
12 procedures or the waiver of regular procedures.

13 “(E) An agency may by regulation transfer part of the
14 number of days of the time limit prescribed in (A) (ii) to
15 the time limit prescribed in (A) (i). In the event of such a
16 transfer, the provisions of paragraph (C) shall apply to
17 the time limits prescribed under such clauses as modified by
18 such transfer. Any person making a request to any agency for
19 records under paragraph (1), (2), or (3) of this subsection
20 shall be deemed to have exhausted his administrative remedies
21 with respect to such request if the agency fails to comply
22 with the applicable time limit provisions of this para-
23 graph. If the Government can show exceptional circumstances

24 exist and that the agency is exercising due diligence in re-

25 sponding to the request, the court may retain jurisdiction

14

1 and allow the agency additional time to complete its review of
2 the records. Upon any determination by an agency to comply
3 with a request for records, the records shall be made prompt-
4 ly available to such person making such request. Any noti-
5 fication of denial of any request for records under this sub-
6 section shall set forth the names and titles or positions of
7 each person responsible for the denial of such request.”.

8 SEC. 2. (a) Section 552(b)(1) of title 5, United States
9 Code, is amended to read as follows:

10 “(1) specifically required by an Executive order
11 or statute to be kept secret in the interest of national
12 defense or foreign policy and are in fact covered by such
13 order or statute;”.

14 (b) Section 552(b) of title 5, United States Code, is
15 amended by adding at the end the following “Any reason-
16 ably segregable portion of a record shall be provided to any
17 person requesting such record after deletion of the portions
18 which are exempt under this subsection.”.

19 SEC. 3. Section 552 of title 5, United States Code, is
20 amended by adding at the end thereof the following new
21 subsections:

22 “(d) On or before March 1 of each calendar year, each
23 agency shall submit a report covering the preceding calen-

24 dar year to the Committee on the Judiciary of the Senate
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1 *and the Committee on Government Operations of the House*
2 *of Representatives, which shall include—*

3 *“(1) the number of determinations made by such*
4 *agency not to comply with requests for records made to*
5 *such agency under subsection (a) and the reasons for*
6 *each such determination;*

7 *“(2) the number of appeals made by persons under*
8 *subsection (a)(6), the result of such appeals, and the*
9 *reason for the action upon each appeal that results in a*
10 *denial of information;*

11 *“(3) the names and titles or positions of each person*
12 *responsible for the denial of records requested under this*
13 *section, and the number of instances of participation*
14 *for each;*

15 *“(4) a copy of every rule made by such agency*
16 *regarding this section;*

17 *“(5) the total amount of fees collected by the*
18 *agency for making records available under this section;*

19 *“(6) a copy of every certification promulgated by*
20 *such agency under subsection (a)(6)(B) of this sec-*
21 *tion; and*

22 *“(7) such other information as indicates efforts to*
23 *administer fully this section.*

24 *The Attorney General shall submit an annual report on or*
25 *before March 1 of each calendar year which shall include for*

16

1 the prior calendar year a listing of the number of cases
2 arising under this section, the exemption involved in each
3 case, the disposition of such case, and the cost, fees, and
4 penalties assessed under subsections (a) (3) (E), (F) and
5 (G). Such report shall also include a description of the
6 efforts undertaken by the Department of Justice to encourage
7 agency compliance with this section.

8 “(e) For purposes of this section, the term ‘agency’
9 means any agency defined in section 551(1) of this title,
10 and in addition includes the United States Postal Service,
11 the Postal Rate Commission, and any other authority of
12 the Government of the United States which is a corporation
13 and which receives any appropriated funds.”

14 SEC. 4. There is hereby authorized to be appropriated
15 such sums as may be necessary to assist in carrying out the
16 purposes of this Act and of section 552 of title 5, United
17 States Code.

18 SEC. 5. The amendments made by this Act shall take
19 effect on the ninetieth day beginning after the date of enact-
20 ment of this Act.

Passed the House of Representatives March 14, 1974.

Attest: W. PAT JENNINGS,

Clerk.

Passed the Senate May 30, 1974.

Approved For Release 2003/05/06 : CIA-RDP75B00380R000600200021-5

Attest: FRANCIS R. VALLEO,

Secretary

93RD CONGRESS
2ND SESSION
H. R. 12471

AN ACT

To amend section 552 of title 5, United States Code, known as the Freedom of Information Act.

MARCH 19, 1974

Received

MAY 30, 1974

Considered, amended, read the third time, and passed

INTELLIGENCE SOURCES AND METHODS, RESTRICTED DATA,
AND COMMUNICATION INTELLIGENCE UNDER THE PROPOSED
FREEDOM OF INFORMATION ACT AMENDMENTS

Problem: Aide-Memoire

Senate Report: Recognition of Special
Categories of Sensitive Information (Tab A)

House Report: Recognition of Statutory
("born classified") Sensitive Information (Tab B)

S. 2543, Reported Provision (Tab C)

Excerpt Senator Kennedy's Comments on
S. 2543 Committee Report (Tab D)

Letter to Senator McClellan (Tab E)

AIDE-MEMOIRE

Amendments to Proposed Freedom of Information Act Amendments

S. 2543

1. Section (b)(1) of S. 2543 as amended in Committee would overrule the decision of the Supreme Court in the Environmental Protection Agency v. Mink, 93 S. Ct. 827 (1973), by authorizing court review of the contents of records withheld by a Federal agency under the nine specific exemptions set forth in Title 5 U.S.C.A. 552(b). The purpose of such review would be to determine if the information withheld meets the criteria of the exemption involved.
2. Matters specifically exempted from public inspection by section 552(b) of the Freedom of Information Act include those "specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy" [552(b)(1)]. It was this exemption which was at issue in the Mink case. A separate exemption from public inspection is afforded matters "specifically exempted from disclosure by statute" [552(b)(3)].
3. There is an important distinction between these two exemptions. The former refers to classification of information under Executive Order, which specifies criteria for evaluating and classifying governmental documents. The latter exemption, based upon express statutory authority, involves an act of Congress approved by the President which directs the proper handling of especially sensitive information. Three such categories of information are: Restricted Data [42 U.S.C.A. 2162], relating to atomic energy matters; Communication Intelligence [18 U.S.C.A. 798]; and Intelligence Sources and Methods [50 U.S.C.A. 403(d)(3) and g]. It should be made abundantly clear that it is not the intent of Congress to encourage or authorize a detailed court review of information which has been specifically designated in an act of Congress as deserving of statutory protection. This distinction is recognized by the Judiciary Committee in its report on S. 2543 (Tab A). The House report on H.R. 12471, a similar bill, also recognized this distinction for Restricted Data (Tab B).

4. As reported out, S. 2543 recognizes that with respect to sensitive information a presumption should be accorded by the court to an agency head who has personally examined and determined that the records in question are secret. Senator Kennedy in a floor statement has noted this requirement (Tab D) which is also commented upon in greater detail in the Committee report (Tab A).
5. If S. 2543 as reported is amended to drop the procedures for the in camera court review recommended by the Committee, adoption of the Agency's original position (Tab E) is strongly urged.

Excerpt from Senate Judiciary CommitteeReport on S. 2543

By statute certain special categories of sensitive information—Restricted Data (42 U.S.C. § 2162), Communication Intelligence (18 U.S.C. § 793), and Intelligence Sources and Methods (50 U.S.C. § 405 (d) (3) and (g))—must be given special protection from unauthorized disclosure. These categories of information have been exempted from public inspection under section 552(b) (3), “specifically exempted from disclosure by statute,” and (b) (1), “specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy.” The Committee believes that these categories of information will be adequately protected under S. 2543. If such information is ever subject to court review, the review will be conducted in camera under the procedures established in the bill for information exempt under section 552(b) (1), which has been amended to include matters specifically required to be kept secret “by an Executive Order or statute.” It is also expected that in such cases the court will recognize that such information is inherently sensitive and that the latitude for discretion permitted under Executive Order 11652 does not apply to such information.

The specific procedures delineated in section 552(a) (4) (B) (ii) apply only to cases where exemption (b) (1) is invoked.

S. Rept. 93-854, pp. 16-17

House Report 93-876

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Even with the broader language of these amendments as they apply to exemption (b)(1), information may still be protected under the exemption of 552(b)(3): "specifically exempted from disclosure by statute." This would be the case, for example, with the Atomic Energy Act of 1954, as amended. It features the "born classified" concept. This means that there is no administrative discretion to classify, if information is defined as "restricted data" under that Act, but only to declassify such data.

The *in camera* provision is permissive and not mandatory. It is the intent of the committee that each court be free to employ whatever means it finds necessary to discharge its responsibilities.

Court Review Provision in S. 2543

C

11 “(B)(i) On complaint, the district court of the United
12 States in the district in which the complainant resides, or
13 has his principal place of business, or in which the agency
14 records are situated, or in the District of Columbia, has juris-
15 diction to enjoin the agency from withholding agency records
16 and to order the production of any agency records improperly
17 withheld from the complainant. In such a case the court shall
18 consider the case de novo, with such in camera examination
19 of the requested records as it finds appropriate to determine
20 whether such records or any part thereof may be withheld
21 under any of the exemptions set forth in subsection (b) of
22 this section, and the burden is on the agency to sustain its
23 action.

24 “(ii) In determining whether a document is in fact spe-
25 cifically required by an Executive order or statute to be kept

(continued on next page)

Court Review Provision in S. 2543 (continued)

1 *secret in the interest of national defense or foreign policy,*
2 *a court may review the contested document in camera if it is*
3 *unable to resolve the matter on the basis of affidavits and other*
4 *information submitted by the parties. In conjunction with*
5 *its in camera examination, the court may consider further*
6 *argument, or an ex parte showing by the Government, in ex-*
7 *planation of the withholding. If there has been filed in the*
8 *record an affidavit by the head of the agency certifying that*
9 *he has personally examined the documents withheld and has*
10 *determined after such examination that they should be with-*
11 *held under the criteria established by a statute or Executive*
12 *order referred to in subsection (b)(1) of this section, the*
13 *court shall sustain such withholding unless, following its in*
14 *camera examination, it finds the withholding is without a rea-*
15 *sonable basis under such criteria.*

Excerpt from Senator Kennedy's Floor Comments on
Judiciary Committee Report on S. 2543

D

Where agencies want to withhold documents under a statute or Executive order as being classified in the interest of national defense or foreign policy S. 2543 as amended provides that courts may examine the documents themselves in camera and must determine whether in fact the documents were properly classified. The bill sets out procedures to protect particularly sensitive information, and it provides that courts should utilize an in camera examination only if they cannot resolve the matter on the basis of arguments and affidavits. But it firmly establishes the principle of judicial review of—and accountability outside the executive branch for—agency decisions to classify material.

Congressional Record, May 16, 1974
Page S 8347

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

30 April 1974

Honorable John L. McClellan, Chairman
Intelligence Operations Subcommittee
Committee on Appropriations
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This letter responds to your request for comments on the possible impact upon the operations of this Agency of S. 2543 which amends the Freedom of Information Act (5 U. S. C. 522).

Presently, this Agency's records are for the most part not available for public inspection because the Act exempts, among other things, matters that are:

"(b)(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(3) specifically exempted from disclosure by statute;"

Although S. 2543 retains these general exemptions, it adds a new provision which would permit an in camera court review of any or all records to determine whether they shall be subject to public inspection. This provision appears to be designed to overrule a Supreme Court decision that the contents of records withheld under exemption (b)(1) are not reviewable by the courts (Environmental Protection Agency v. Mink, 93 S. Ct. 827 (1973)).

The National Security Act of 1947 provides:

"... That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure;" (Sec. 102(d)(3))

This language is designed to protect the lives and welfare of sources of sensitive foreign intelligence information and to protect against the compromise of technical collection efforts.

I do not believe that the nation's interest would best be served by legislation which would make it possible for the most sensitive of Agency records to be subject to court review as a result of a suit by an individual, who under the statute may not even be a U.S. citizen, for their public inspection. It is recommended that information which is made inherently sensitive by statute be exempted from the court review provisions of S. 2543. Suggested language accomplishing this for three categories of sensitive information recognized by statute (Intelligence Sources and Methods, Communications Intelligence and Restricted Data) is enclosed.

If S. 2543 or similar legislation is favorably considered, it is hoped that you would be able to support appropriate exemption for this Agency as proposed.

Sincerely,

/s/

W. E. Colby
Director

AMENDMENT TO S. 2543 (Committee Print, January 29, 1974)

The added language is underlined and would be inserted at line 16, page 3:

"(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall consider the case de novo, with, except for matters withheld under section 552(b)(3), involving, but not limited to, Restricted Data, intelligence sources and methods, and communication intelligence under sections 2162 of Title 42, 403(d)(3) and 403g of Title 50, 798 of Title 18 and 73 Stat. 64, such in camera examination of the requested records as it finds appropriate to determine whether such records or any part thereof may be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.